

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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PORT OF SUBS, INC.

Plaintiff,

v.

TAHOE INVESTMENTS, INC.; MICHAEL  
GIESLER; AND MICHELE GIESLER

Defendants.

3:16-CV-00411-LRH-VPC

ORDER

Before the court is defendant Michele Giesler's motion to transfer for improper venue under 28 U.S.C. § 1406(a), or in the alternative, to transfer for convenience under § 1404(a). ECF No. 1.<sup>1</sup> Port of Subs, Inc. ("POS") filed a response (ECF No. 10), to which Giesler replied (ECF No. 11). Co-defendants Michael Giesler and Tahoe Investments, Inc. ("Tahoe") have joined the motion. ECF No. 12.

**I. Background**

This suit involves the alleged breach of a series of franchise agreements between franchisor POS, a Nevada corporation, and franchisee Tahoe, a California corporation. Pursuant to four separate agreements, Tahoe operated four franchise stores in California, three located in or around Palms Springs and one in Truckee. ECF No. 1-1 at 4. Michael Giesler, a Palm Springs resident, signed a "Guaranty of Franchise Agreement" with POS. *Id.*

POS eventually filed suit against Tahoe and Michael Giesler in Nevada district court in Washoe County. ECF No. 1 at 2. POS alleges that Tahoe breached its franchise agreements "by

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<sup>1</sup> This citation refers to the court's docket number.

1 failing to submit required financial reports, failing to pay suppliers, failing to keep the restaurants  
 2 open the minimum required hours, [and] failing to . . . provide records as part of a mandatory  
 3 audit when POS determined [that] Tahoe was underreporting its gross receipts for purposes of  
 4 depriving POS of full royalty payments.” ECF No. 10 at 2.

5 The parties later stipulated to POS filing an amended complaint in order to add Michele  
 6 Giesler (“Giesler”) as a defendant, based on her execution of a guaranty agreement with POS for  
 7 one of the four franchise stores. ECF No. 10. Defendants’ counsel accepted service on her behalf  
 8 on June 23, 2016, and she removed the suit to this court on July 08, 2016 (ECF No. 2). Giesler  
 9 concurrently filed the instant motion to transfer venue to the U.S. District Court for the Central  
 10 District of California, which encompasses Palm Springs.

## 11 **II. Discussion**

### 12 **A. Venue is proper in Nevada**

13 Giesler seeks to transfer venue under 28 U.S.C. § 1406(a) or, alternatively, § 1404(a).  
 14 The former section governs when a plaintiff files suit in a federal judicial district that is an  
 15 improper venue, in which case the district court may either dismiss the case, “or if it be in the  
 16 interest of justice, transfer such case to any district or division in which it could have been  
 17 brought.” 28 U.S.C. § 1406(a). Conversely, § 1404 applies when a plaintiff files suit in a proper  
 18 district and allows the court, [f]or the convenience of parties and witnesses [and] in the interest  
 19 of justice,” to transfer the case “to any other district or division where it might have been  
 20 brought.” 28 U.S.C. § 1404(a); *see also Abrams Shell v. Shell Oil Co.*, 165 F. Supp. 2d 1096,  
 21 1102 (C.D. Cal. 2001) (discussing the distinction between §§ 1404 and 1406). Normally, § 1391  
 22 governs which venues are proper in a civil case.

23 Here, Giesler asserts that the District of Nevada is an improper venue but does not  
 24 provide any analysis on this point. POS counters that venue is proper in this judicial district  
 25 under § 1391(b)(2) because the defendants allegedly “submitted their false and fraudulent  
 26 accounting to POS” in Reno, Nevada, POS’ primary place of business. ECF No. 10 at 8.

27 The court, however, need not address the merits of this argument because § 1441, rather  
 28 than § 1391, governs venue when a plaintiff files suit in state court and a defendant removes the

1 case to federal court. *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 665 (1953). “Section  
 2 1441(a) expressly provides that the proper venue of a removed action is ‘the district court of the  
 3 United States for the district and division embracing the place where such action is pending.’” *Id.*  
 4 at 666 (quoting 28 U.S.C. § 1441(a)); *see also Kerobo v. Sw. Clean Fuels, Corp.*, 285 F.3d 531,  
 5 535 (6th Cir. 2002); 14C Charles Alan Wright & Arthur R. Miller, *Federal Practice and*  
 6 *Procedure* § 1006 (4th ed.) (explaining that “the general venue statutes . . . do not apply to cases  
 7 that have been initiated in a state court and removed to a federal court.”).

8 Because Giesler removed this case to the District of Nevada, which “embraces” the entire  
 9 State of Nevada, venue is proper in this judicial district. Section 1404(a) therefore governs her  
 10 motion to transfer.

#### 11 **B. Motion to transfer venue under § 1404**

12 “Under § 1404(a), the district court has discretion to adjudicate motions for transfer  
 13 according to an individualized, case-by-case consideration of convenience and fairness.” *Jones v.*  
 14 *GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000) (internal quotation marks omitted)  
 15 (quoting *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)). In making this assessment, courts  
 16 normally “weigh the relevant [private and public-interest] factors and decide whether, on  
 17 balance, a transfer would serve ‘the convenience of parties and witnesses’ and otherwise promote  
 18 ‘the interest of justice.’” *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S.  
 19 Ct. 568, 581 (2013) (quoting 28 U.S.C. § 1404(a)) (listing common private and public-interest  
 20 factors in n. 6); *see also Jones*, 211 F.3d at 498–99 (listing other common factors). The moving  
 21 party bears the burden of establishing that the proposed district is a more appropriate forum for  
 22 the action. *Operation: Heroes, Ltd. v. Procter & Gamble Prods., Inc.*, 903 F. Supp. 2d 1106,  
 23 1111 (D. Nev. 2012).

24 Here, the parties devote much of their briefing to arguing that the private-interest factors  
 25 in this case weigh in their favor. However, neither party squarely addresses the significance of  
 26 the forum-selection clause in all four franchise agreements. Each clause represents Tahoe’s  
 27 acknowledgment that a suit to enforce the agreement must, at POS’ “sole option,” be  
 28

1 commenced in Nevada state or federal court or the state or federal court of the judicial district in  
2 which the franchisee's store is located. *E.g.*, ECF No. 1-1 at 141.

3 In *Atlantic Marine*, the U.S. Supreme Court explained that the balancing test for motions  
4 to transfer "changes . . . when the parties' contract contains a valid forum-selection clause, which  
5 'represents the parties' agreement as to the most proper forum.'" 134 S. Ct. at 581 (quoting  
6 *Stewart*, 487 U.S. 22, 31 (1988)). "The 'enforcement of valid forum-selection clauses, bargained  
7 for by the parties, protects their legitimate expectations and furthers vital interests of the justice  
8 system.' For that reason, and because the overarching consideration under § 1404(a) is whether a  
9 transfer would promote 'the interest of justice,' 'a valid forum-selection clause should be given  
10 controlling weight in all but the most exceptional cases.'" *Id.* (internal brackets omitted) (quoting  
11 *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring)).

12 Here, POS exercised the forum-selection clauses under the franchise agreements by  
13 deciding to file suit in Nevada. Before determining whether these clauses are dispositive to this  
14 motion under *Atlantic Marine*, the court must address Giesler's assertion that the clauses are void  
15 under California law. *See* ECF No. 1 at 6. Giesler indirectly cites to California Business and  
16 Professional Code § 20040.5, which provides that "[a] provision in a franchise agreement  
17 restricting venue to a forum outside" of California is void. POS does not directly respond to this  
18 argument.

19 Federal courts "apply federal law to determine the enforceability of [a] forum selection  
20 clause." *Doe I v. AOL LLC*, 552 F.3d 1077, 1083 (9th Cir. 2009). "A forum selection clause is  
21 presumptively valid; the party seeking to avoid a forum selection clause bears a 'heavy burden'  
22 to establish a ground upon which [courts] will conclude the clause is unenforceable." *Id.* (quoting  
23 *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972)). "Under the directives of the  
24 Supreme Court in *Bremen*, . . . a forum selection clause is unenforceable 'if enforcement would  
25 contravene a strong public policy of the forum in which suit is brought . . .'" *Id.* (quoting  
26 *Bremen*, 407 U.S. at 15).

27 In *Jones v. GNC Franchising*, the Ninth Circuit applied this framework in holding that  
28 Cal. Bus. & Prof. Code § 20040.5 barred enforcement of a forum-selection clause that designated

1 Pennsylvania state or federal courts as the venue for any agreement disputes. 211 F.3d at 498.  
2 After the plaintiff, a California-based franchisee, brought suit in California state court, the  
3 franchisor removed the case and moved to transfer it to the Western District of Pennsylvania. *Id.*  
4 at 496. Finding that § 20040.5 establishes a strong public policy against forum-selection clauses,  
5 the Ninth Circuit held that the clause was unenforceable in the context of a motion to transfer  
6 under § 1406.

7 Here, unlike *Jones*, POS brought suit in Nevada. Therefore, California’s public policy  
8 against forum-selection clauses that designate a forum outside of the state does not belong to the  
9 “forum in which suit [was] brought . . .” *Doe I*, 552 F.3d at 1083; *see also Incline Energy, LLC*  
10 *v. Penna Grp., LLC*, 787 F. Supp. 2d 1140, 1145 (D. Nev. 2011) (“*Doe I* prevents enforcement  
11 of a forum selection clause where repugnant to the public policy of the forum in which the case  
12 is brought, not where repugnant to the public policy of a forum where the case *might have been*  
13 brought.”).<sup>2</sup> Additionally, the court has not identified a Nevada public policy against forum-  
14 selection clauses, and it is unlikely that Nevada would oppose a clause that selected this state as  
15 the forum for this dispute. After all, Cal. Bus. & Prof. Code § 20040.5 only applies to clauses  
16 that restrict venue to a forum outside of California and would therefore allow for a clause that  
17 designated California as the appropriate venue.

18 Because forum-selection clauses have “controlling weight in all but the most exceptional  
19 cases[,]” the court finds that Nevada is the proper venue for this case. Giesler’s motion will  
20 therefore be denied.

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26 <sup>2</sup> The court also recognizes that several district courts within this Circuit have found that, after  
27 *Atlantic Marine*, a state statute that disfavors forum-selection clauses is insufficient to find such  
28 clauses unenforceable. *E.g., Idaho Pac. Corp. v. Binex Line Corp.*, No. 4:15-CV-00510-CWD,  
2016 WL 843254 (D. Idaho Mar. 1, 2016). However, based on the inapplicability of California  
public policy in this case, the court need not reach this question.

1     **III. Conclusion**

2             IT IS THEREFORE ORDERED that defendant Michele Giesler's motion to transfer for  
3     improper venue under 28 U.S.C. § 1406(a), or in the alternative, to transfer for convenience under  
4     § 1404(a) (ECF No. 1) is DENIED.

5             IT IS SO ORDERED.

6             DATED this 3rd day of November, 2016.



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LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE